

<b>COMPLIANCE BOARD OPINION No. 97-8</b>
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May 14, 1997

*Mr. Conrad Potemra*

The Open Meetings Compliance Board has considered your complaint of March 4, 1997, in which you allege that the Commissioners of Poolesville discussed two matters in a closed session on February 3, 1997, that should have been discussed in open session. For the reasons stated below, the Compliance Board finds that the Act was violated when the Commissioners discussed the first matter in closed session but was not violated when the Commissioners discussed the second matter in closed session.

**I**

**Discussion of President's Meeting With County Council Member**

According to the minutes attached to your complaint, during the closed session the President of the Commissioners of Poolesville, Mr. Roy Johnson, informed his colleagues that he had met two days earlier with Councilwoman Dacek to discuss funding for a gymnasium at a new middle school. As the Compliance Board understands the situation, the Montgomery County Board of Education had decided, as a cost savings measure, not to provide a gymnasium in the new school. The minutes that you attach summarize Mr. Roy Johnson's presentation to his colleagues on February 3 as follows:

[Councilwoman Dacek] wanted to find out if the Town could fund all or part of the project. Mr. R. Johnson explained to her that the Town did not have a pot of excess funds in the bank, and that the Town's funds were allocated toward Capital Projects. She said that she understood. There was a discussion of the responsibility of the county for funding.

The Commissioners assert that this discussion was permissibly closed under two exceptions in the Open Meetings Act: §10-508(a)(3) of the State Government Article, which authorizes a public body to meet in closed session to "consider the acquisition of real property for a public purpose and matters directly related thereto"; and §10-508(a)(14), which authorizes a public body to meet in closed session "before a contract is awarded or bids are opened, [to] discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the

ability of the public body to participate in the competitive bidding or proposal process.” These exceptions, like all others in the Open Meetings Act, are to be “strictly construed in favor of open meetings ....” §10-508(c).

In the opinion of the Compliance Board, neither of these exceptions justified the closing of this portion of the meeting. A discussion by the Commissioners of Poolesville about potential town funding of a portion of the incremental cost of constructing a school gymnasium does not involve any matter “directly related to the acquisition of real property.” This exception is surely limited to discussion by a public body about property that *it* might acquire. As a matter of law, however, Poolesville cannot acquire any interest in the real property used for a public school, because all school property is “held in trust for the benefit of the school or school system by the appropriate county board [of education] ....” §4-114(a)(1) of the Education Article.

Nor is there any apparent basis for the Commissioners to have invoked the exception in §10-508(a)(14). Although the discussion might have pertained to negotiations among the Commissioners, the County Council, and the Board of Education, there is no exception in the Act for “negotiation issues” as such. Compliance Board Opinion 94-5, at 9 n. 4 (July 29, 1994). The exception in §10-508(a)(14) is limited to circumstances in which a public body is participating in a “competitive bidding or proposal process.” No such process is evident here.<sup>1</sup>

Consequently, the Compliance Board finds that the Commissioners violated the Act by holding this discussion in closed session.

## **II**

### **Discussion of Process for Review of Draft Letters**

The second alleged violation concerns a discussion in closed session of, as you put it, “using interoffice memos for draft letters.” The minutes attached to your complaint describe this discussion as follows:

The next agenda item included personnel issues and Mr. R. Johnson asked that the Commissioners pass draft letters using an interoffice memo rather than reading them at the meetings. He felt once the letters were final then a summary could be

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<sup>1</sup> Because the Commissioners of Poolesville do not contend that the discussion was excluded from the Act as an “executive function,” we need not consider that potential basis for a closed session.

presented at the meetings. Mr. A. Johnson reminded the Commissioners that official correspondence which addresses Town policy or position [*sic*] should be seen by all Commissioners. A discussion followed concerning the difficulty of elected officials writing or speaking as a private citizen.

As we understand the situation, this discussion encompassed two distinct although related topics: the consequences of a commissioner's writing a letter as a "private citizen" on a matter within the official purview of the Commissioners, and the process by which drafts of "official" letters were to be reviewed.

As to the first of these topics, the Commissioners suggest that this discussion did not involve the transaction of public business or, if it did, that it was excluded from the Act as an "executive function" or permissibly closed as a "personnel issue."<sup>2</sup> The Open Meetings Act only applies when a quorum of a public body has convened "for the consideration or transaction of public business." Hence, if members of a public body are discussing the personal situation of one of them, that discussion would not be covered by the Act. As we observed in a prior opinion, "in a collegial body, members often develop personal relations of a sort that are common in the workplace. When a public official shares the joys or reversals of life with her colleagues, the public body is not engaged in the 'consideration or transaction of public business.'" Compliance Board Opinion 95-7, at 3 (October 18, 1995).

Yet, as we also concluded in that opinion, when a "personal" matter is linked to any phase of the decision making process of the public body itself, then public business *is* transacted. That, in our view, is what happened here. As the minutes reflect, the discussion about the views of one commissioner as a private citizen on a particular issue evolved into a more general discussion: the difficulty of differentiating the personal views of a commissioner, expressed in a public way, from the official position of the Commissioners. This exercise in line drawing — of protecting the Commissioners as a public body from the adverse consequences of statements made by one member — is itself a matter of public business. Without attempting to guess at the substance of the Commissioners' discussion, the Compliance Board considers a discussion of matters like the use of disclaimers, the avoidance of official titles, or advance notice to colleagues as involving the public business of the body.

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<sup>2</sup> The latter was the exception cited at the time by the Commissioners.

The Compliance Board is unable to state an opinion whether the “personnel” exception, §10-508(a)(1), justified the closing of this discussion. In general, that exception would not apply to criticism of a member of a public body by his or her colleagues. Expressing unhappiness about something that a public official has done is not the kind of “personnel matter” covered by the exception. The specific personnel matters covered are all discrete actions involving an employee: “appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation.” The “other personnel matter[s]” also covered by the exception must be comparable in nature. If, however, the discussion amounted to a consideration of formal censure of a commissioner, then the personnel exception was properly invoked. From the information available, the Compliance Board cannot make a judgment on this point.

The Compliance Board is able to conclude, however, that this discussion was within the “executive function” exclusion and therefore not covered by the Act. *See* §10-503(a)(1)(i). The Charter of Poolesville vests in the Commissioners, as a body, the responsibility to take positions on matters affecting the town. When the Commissioners discussed procedures to protect that official prerogative against the potential confusion resulting from a member’s nominally “private” expression of views, they were merely administering existing law through their internal operating methods.

The other topic covered in this portion of the closed session had to do with the manner in which draft letters are presented to the Commissioners for their consideration. The suggestion was that drafts be circulated in writing by interoffice memorandum *before* meetings, rather than be read aloud for the first time *at* meetings.

The Commissioners assert that this discussion was also encompassed by the executive function exclusion. The Compliance Board agrees. Implicit in the Charter of Poolesville is the responsibility of the Commissioners to issue official correspondence on matters of public business. The details of how drafts are to reach the Commissioners for their consideration seems to us an aspect of the implementation or administration of that preexisting legal requirement and therefore to be an “executive function.” Consequently, the Commissioners did not violate the Act by having this discussion in closed session.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.  
Courtney McKeldin  
Tyler G. Webb